

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TONY ORR,

Plaintiff,

vs.

Civ. No. 02-777 DJS

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

MEMORANDUM OPINION and ORDER

THIS MATTER comes before the Court upon Defendant's Motion to Dismiss and Memorandum in Support filed December 17, 2002. Plaintiff did not respond. Pursuant to D.N.M.LR-Civ. 7.5, failure to serve or file a response "constitutes consent to grant the motion." Moreover, as discussed below, the Court does not have subject matter jurisdiction and thus Plaintiff's Complaint must be dismissed.

Procedural History

On May 3, 2002, a decision was issued by an Administrative Law Judge (ALJ) finding that Plaintiff was not entitled to a period of disability or disability insurance benefits. Plaintiff did not request the Appeals Council to review his denial of benefits. Rather, Plaintiff filed the present civil action on July 3, 2002.

Legal Analysis

The jurisdictional basis for judicial review of cases arising under the Social Security Act is 42 U.S.C. §405(g). 42 U.S.C. §405(g) authorizes judicial review only of a “final decision of the Commissioner of Social Security made after a hearing.” Plaintiff must request review by the Appeals Council to receive a final decision. 20 C.F.R. §§404.981, 422.210. Because the Plaintiff did not request review by the Appeals Council and thus did not exhaust his administrative appeal remedies, he did not obtain a final decision.

As the Plaintiff filed a civil action instead of a request for review within sixty days of the ALJ’s decision, it is the Appeals Council’s policy to treat the civil action as a timely filed request for review. Declaration of Robin M. Marquis, Chief Court Case Preparation and Review Branch 2, Office of Hearings and Appeals, p. 3. Thus, upon a dismissal without prejudice this matter will be returned to the Appeals Council for appropriate action.

IT IS THEREFORE ORDERED that Defendant’s Motion to Dismiss and Memorandum in Support is granted and Plaintiff’s Complaint is dismissed without prejudice.



Don J. Svet
UNITED STATES MAGISTRATE JUDGE